

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA

Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>96-12628</u>
YARBROUGH T. TOLBERT)	
)	
Debtor)	
_____)	
)	
YARBROUGH T. TOLBERT)	FILED
)	at 2 o'clock & 25 min. P.M.
Movant)	Date: 1-20-98
)	
vs.)	
)	
ADAPTIVE HANDICAPPED)	
EQUIPMENT, INC.)	
)	
Respondent)	

ORDER

The debtor, Yarbrough Tolbert, objects to the secured status of the claim of Adaptive Handicapped Equipment, Inc., ("Adaptive"), alleging that the claim, based upon a Purchase Lease Agreement, is a disguised security agreement rather than a lease under Georgia law. Further, because Adaptive failed to perfect its security interest, in accordance with Georgia law, the secured claim should be reduce to unsecured status. Adaptive filed a response in opposition. Mr. Tolbert's objection to claim is sustained.

Mr. Tolbert and Toria Tolbert entered a Purchase Lease

Agreement with Adaptive on May 1, 1996 for a 1983 Ford van containing disabled driver equipment features, allowing debtor to drive the vehicle. The terms of the Purchase Lease Agreement are as follows:

1. Lessor hereby agrees to lease the described vehicle:
1983 Ford E150 van, vin# 1FTDE14F6DHA40131, Automatic Low effort steering, hand controls, 2 front seats, rear sofa, Braun wheelchair lift, B&D 6-way power seat, 4" lowered floor, Automatic door opener, Front and rear air conditioner, Mileage = 101605, Lease Price = \$10.00 after 48 month lease completed
2. This Lease Purchase Agreement will begin on May 1, 1996 with the following financial terms:
\$600.00 deposit on May 1, 1996
\$249.00 payment on May 15, 1996
\$283.33 payment each month on the 3rd of each month, beginning on June 3, 1996 and continuing for 47 months.
(Ending on May 3, 2000)
3. Lessor warrants that it is the legal owner of said vehicle, that said vehicle is free and clear of all adverse claims, liens and encumbrances. The Lessor will remain the owner of said vehicle until the full amount of the lease has been paid. At this time, the title to said vehicle will be transferred to the Lessee.
4. The Lessee will provide proof of the property insurance coverage for said vehicle, which is acceptable to Lessor.
5. Said vehicle is being leased "as is" without any express or implied warranty.
6. If the Lessee does not comply with the payment terms, the Lessee (sic) has the right to pick-up said vehicle without notice.
7. Lessee shall not have the right to assign or sub-let or use for hire said vehicle at any time.
8. This Lease Purchase shall be binding upon and inure to the benefit of both parties, their successors, and personal representatives.

Adaptive did not perfect a security interest in the van pursuant to Georgia law. Mr. Tolbert filed for chapter 13 bankruptcy relief on November 12, 1996. Adaptive filed a secured proof of claim in the bankruptcy case for \$13,599.84 for the

Purchase Lease Agreement. Mr. Tolbert objected to the secured status of this claim.

The issue is whether the Purchase Lease Agreement constitutes a true lease or a disguised security agreement. If the transaction is a true lease, as Adaptive asserts, the debtor must assume the lease and perform the lease obligation, or reject the contract and return the van to Adaptive. 11 U.S.C. § 365.¹ If the transaction is a disguised security agreement, as Mr. Tolbert asserts, the creditor is left without a perfected security interest in the van and with an unsecured claim against the debtor.

Georgia's choice of law provision determines which state law applies to interpret these documents. United Counties Trust Co. v. Mac Lum, Inc., 643 F.2d 1140 (5th Cir. 1981) (federal courts should implement the choice of law rules of the state in which the court sits). Georgia's choice of law provision allows parties to a commercial contract to specify any applicable state law if that law bears a reasonable relation to the transaction, but if no state law is specified, Georgia law will apply to any transaction "bearing an appropriate relation to this state." Official Code of Georgia (O.C.G.A) § 11-1-105. The Purchase Lease Agreement does not specify

¹11 USC § 365(a). Executory contracts and unexpired leases (a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

the applicable state substantive law. Because the parties are located in Georgia, the agreement was executed in Georgia, and the van is located in Georgia, I will apply Georgia substantive law to determine the respective rights and obligations of the parties under the agreement.

Moore v. Emery (In re American Steel Product, Inc.), 203 B.R. 504

(Bankr. S.D. Ga. 1996) (Dalis, J.), controls this case.

The U.C.C. defines a lease as "... a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or

a sale or return, or retention or creation of a security interest is not a lease." O.C.G.A. § 11-2a-1031(J). Whether a transaction creates a security interest or a lease is determined by the particular elements of the transaction. The U.C.C. defines a per-se security interest and lists additional factors, which may, but do not automatically, indicate a security agreement.

O.C.G.A. § 11-1-201(37)². If a transaction contains the

²O.C.G.A. § 11-1-201(37) provides in pertinent part:

“Security Interest” means an interest in personal property or fixtures which secures payment or performance of an obligation Unless a lease or consignment is intended as security, reservation of title thereunder is not a “security interest”....

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and

(a) The original term of the lease is equal to or greater than the remaining economic life of the goods;

(b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become owner of the goods;

(c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement; or

(d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

A transaction does not create a security interest merely because it

provides that:

(a) The present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into;

(b) The lessee assumes the risk of loss of the goods, or agrees to pay taxes, insurance, filing, or registration fees, or service or maintenance costs with respect to the goods;

(c) The lessee has an option to renew the lease or become the owner of the goods;

(d) The lessee has an option to renew the lease for a fixed rent that is

elements of the per-se rule, the court's inquiry ends. However, if the transaction does not fit within the per-se rule, the court must analyze all of the relevant facts to determine whether the transaction creates a lease or a security interest.

equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed; or

(e) The lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

To constitute a security interest as a matter of law, the "rent" paid by the lessee must continue for the entire term of the lease without the lessee holding an option to terminate the payments, and one of four factors listed in subsections (a) - (d) of § 11-1-201(37) must be present.

203 B.R. at 506-07. Under the Purchase Lease Agreement, Mr. Tolbert does not have a right to terminate this contract. While paragraph six of the agreement gives Adaptive the right to take the van upon Mr. Tolbert's non-compliance, that right to terminate belongs to Adaptive not Mr. Tolbert. Mr. Tolbert

remains bound to the Purchase Lease Agreement even if Adaptive takes the van. Thus, the first of the per-se requirements of § 11-1-207(37) is met.

The second requirement is fulfilled under paragraph (d), "(t)he lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement." Paragraph 3 of the Purchase Lease Agreement provides that "(t)he Lessor will remain the owner of said vehicle until the full amount of

the lease has been paid. At this time, the title to said vehicle will be transferred to the Lessee." The § 11-1-207(37) per-se requirements are met, thus making the Purchase Lease Agreement between Mr. Tolbert and Adaptive a disguised security agreement, not a true lease. Because Adaptive failed to perfect its security interest in the van, its interest is unsecured. 11 U.S.C. § 541, 544; Kent v. Bank of Thomson, (In re Kent) Chpt. 13 case No. 90-11183 (Bankr. S.D. Ga. March. 21, 1991) (Dalis, J.) (concurrent with the

Chapter 13 trustee the debtor possesses and may invoke the “strong arm” powers of § 544(a)).

It is, therefore, ORDERED that Yarbrough T. Tolbert’s objection to the secured status of the claim of Adaptive Handicapped Equipment, Inc., is granted, reducing the claim from secured to unsecured status.

JOHN S. DALIS
CHIEF UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 16th day of January, 1998.